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No. 07-733

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IN THE

Supreme Court of the United States

RAY LAWLER,

Petitioner,

v.

JOSEPH NARA.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, when the state and federal constitutional standards are identical, it was plain error for the district court to conclude that a claim of mental incompetency to enter a guilty plea fairly presented a federal constitutional question.

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STATEMENT

1. In December 1983, Joseph Nara's wife left him after she allegedly had become involved in multiple extramarital affairs. Pet. App. 3f. The estrangement caused Nara to become despondent and suicidal. *Id.* at 2d-3d. He sought help from a local mental health center on a "crisis" basis, and shortly thereafter attempted suicide. Following the suicide attempt, he was involuntarily committed to a state psychiatric hospital, where he was treated with antipsychotic and antidepressant drugs. *Id.* at 3d.

After his release from the psychiatric hospital, Nara discovered love letters between his wife and a Pennsylvania State Trooper. After his wife taunted him during a telephone call, Nara drove to his mother-in-law's home to confront his wife. When Nara arrived at the door, his mother-in-law aimed a shotgun in his face and ordered him to leave. An infuriated Nara retrieved a pistol from his car and burst into the house. His mother-in-law again aimed the shotgun at him, while his wife repeatedly struck him with the telephone. In the ensuing struggle, Nara shot and killed both women. Pet. App. 3d.

Nara fled the state, but the next day he telephoned the Pennsylvania State Police and admitted to the killings. He turned himself in and was then charged with two counts of first-degree murder. Pet. App. 3d.

Nara's family grew fearful that he would harm himself in prison, and an employee of the local

mental health center where Nara had previously been treated warned Nara's attorney that he was in need of an immediate mental health evaluation and treatment. Pet. App. 3d-4d. Nara's attorney filed a petition under the Pennsylvania Mental Health Act seeking to have Nara transferred to a state psychiatric hospital for evaluation and commitment, explaining that Nara could harm himself or others. The petition was granted, and Nara was transferred to Mayview State Hospital, where he was treated for depression and suicidal ideations. Nara's attorney, however, did not investigate either Nara's competence to stand trial or his mental state at the time of the killings. *Ibid.* Four days later, Nara was returned to the county prison, where he remained for four months without treatment. *Ibid.*

On June 20, 1984, Nara pled guilty to two counts of first-degree murder before Judge William Franks of the Fayette County Court of Common Pleas. During the plea colloquy, Nara denied having been treated for any mental or emotional illnesses. Pet. App. 4d-5d. Judge Franks then sentenced Nara to two concurrent life sentences. *Id.* at 5d.

After sentencing, prison officials immediately placed Nara in the prison's medical unit "for psychiatric reasons," where he was again treated with antipsychotic and antidepressant drugs, and put in a leg restraint to prevent suicide attempts. Pet. App. 5d. After Nara was diagnosed with "intense suicidal ideation of severe proportions," prison officials had him involuntarily committed to a state psychiatric hospital for 90 days. *Ibid.*

During that time, Nara did not appeal his plea or sentence. In February 1985, Nara once again attempted suicide, and prison officials petitioned to have him involuntarily committed. The judge ordered Nara to be committed in March 1985, and Nara was not released from that commitment until July 1986. Pet. App. 7f-9f.

2. In April 1988, Nara filed a pro se petition for post-conviction relief under the Pennsylvania Post Conviction Hearing Act (PCHA). That petition argued that his "constitutional rights" were violated because the court "accept[ed] his pleas while he was mentally incompetent." Pet. App. 6d. More specifically, the petition alleged that his "Guilty Plea[] is unconstitutional due to being taken in violation of both State and Federal Constitutions," DCT App. 198, because Nara "was incompetent, during the Guilty Plea, * * * in violation of the Constitution(s) both State and Federal," *id.* at 200. Nara's pro se brief in support of his petition similarly asserted that his mental incompetency at the time of the plea violated both the state and federal Constitutions. *Id.* at 207-210; see *id.* at 213 (citing "U.S.C.A. Const Amends 5, 14" and a number of federal cases). The petition also alleged ineffective assistance of counsel based on counsel's failure to have Nara's competency evaluated. Pet. App. 6d.

The trial court denied the petition, addressing only Nara's ineffective assistance of counsel claim. The court mistakenly failed to address the independent mental competency claim. Pet. App. 6d. Nara's counsel appealed, challenging only the

trial court's ineffective assistance of counsel ruling. The Pennsylvania Superior Court denied the appeal on technical grounds, because counsel had failed to conform the petition to the Post-Conviction Relief Act, which had been enacted 12 days before Nara filed his pro se petition. *Id.* at 6d & n.1; see DCT App. 431-433.

Nara then filed a pro se petition for allowance of appeal with the Pennsylvania Supreme Court, which raised both the incompetency claims and ineffective assistance of counsel claims. Pet. App. 6d-7d. That petition specifically invoked the federal Constitution. DCT App. 813-814. The Pennsylvania Supreme Court denied review. Pet. App. 7d; DCT App. 434.

3. In May 1990, Nara filed a second, pro se petition for post-conviction relief. In that petition, he alleged that his plea was "unlawfully induced," Pet. App. 7d, and that his first post-conviction counsel was incompetent for failing to conform the petition to the new Pennsylvania post-conviction law, to present claims for relief "under the applicable state and federal constitutional standards," and "to raise state and federal constitutional arguments," DCT App. 437. The petition also specifically indicated that Nara sought relief for "[a] violation of the provisions of the constitution, law or treaties of the United States which would require the granting of federal habeas corpus relief to a state prisoner." *Id.* at 436. The court subsequently permitted Nara to amend his petition to claim specifically that he had been

mentally incompetent when he pleaded guilty. Pet. App. 7d.

After appointing counsel, the trial court held evidentiary hearings, at which a forensic psychiatrist testified that, based on his study, Nara "was probably 'psychotic' and incapable of entering a plea" at the time of his guilty plea. Pet. App. 7d-8d. The government did not present any rebuttal testimony. *Ibid.* Following the hearing, the trial judge – Judge Franks, the same judge who had taken and witnessed Nara's guilty pleas six years earlier – found the evidence to be "quite convincing" that Nara "was mentally incompetent to knowingly and intelligently plead guilty." DCT App. 573-574; see *id.* at 575 ("[B]ased on the totality of the circumstances, * * * we conclude that defendant's mental state at the time of the pleas rendered his pleas involuntary."); Pet. App. 8d; see generally DCT App. 571-575.

The Commonwealth appealed, and the Pennsylvania Superior Court reversed. The court first explained that the issue on which Judge Franks granted relief – "the invalidity of the 1984 pleas because of [Nara]'s alleged incompetence" – "is the same [issue] as that which was raised in [Nara]'s initial post-conviction petition in 1988 and on appeal therefrom." DCT App. 580. In response to Nara's argument that the prior ruling turned on procedural grounds and thus did not address whether the plea "undermine[d] the truth-determining process," the Superior Court found that contention to have been waived because it was not raised in the first petition. *Ibid.* The court further

ruled that the claim was waived because Nara had not challenged the validity of the pleas within ten days of their entry as required by the Pennsylvania Rules of Criminal Procedure. Pet. App. 8d.

Nara petitioned the Pennsylvania Supreme Court for an allowance of appeal, specifically contending, *inter alia*, that reinstatement of his pleas violated "his due process rights under the Pennsylvania and United States Constitutions," DCT App. 826, because "he was mentally ill and incompetent," *id.* at 825. The Pennsylvania Supreme Court denied relief. *Id.* at 584. Nara filed a petition for a writ of certiorari with this Court that again specifically argued that the entry of his plea violated the federal Constitution because of his incompetency, *id.* at 586, 595; 92-7460 Pet. 1, 10, but this Court denied certiorari, *Nara v. Pennsylvania*, 507 U.S. 995 (1993) (No. 92-7460).

4. In December 1995, Nara filed a third state post-conviction petition in which he again alleged that he had been incompetent at the time he pleaded guilty. Pet. App. 9d. He expressly included as part of his petition a "summary of argument" from a 1990 letter, in which he explained that his incompetency claim arose "under state and federal constitutional standards." See 3d PCRA Pet. 3A & Exh. B; see also 3d PCRA Pet. 3 & Exh. A (explaining that the incompetency claims reflected "violations of both the state and federal constitutions"); *id.* Exh. A ("Generally, a guilty plea which has not been voluntarily and intelligently entered is constitutionally infirm under both the state and federal constitutions.").

Judge Franks permitted Nara, through appointed counsel, to withdraw his petition and file a motion to withdraw his guilty pleas *nunc pro tunc*. Pet. App. 9d. The court then held that, while Nara "has been consistent in his allegations in seeking to withdraw the pleas," DCT App. 657, Nara had waived his incompetency claim because he had not challenged his pleas within ten days of their entry. Nara appealed, noting that Judge Franks had previously held that he was, in fact, incompetent, but the judgment was affirmed. Pet. App. 9d. Nara repeated his argument to the Pennsylvania Supreme Court, which denied review in December 1997. *Id*. at 9d & n.9.

5. a. In December 1998, Nara filed a pro se habeas petition in the United States District Court for the Western District of Pennsylvania, seeking relief on the ground, *inter alia*, that the entry of his pleas at a time when he was mentally incompetent violated the federal Constitution's guarantee of due process, U.S. Const. amend. XIV. The district court initially dismissed the petition as untimely, but the court of appeals reversed and remanded for a hearing on whether the statute of limitations should be equitably tolled based on Nara's "ongoing periods of mental incompetence and allegations that [his lawyer] abandoned him following his appeal to the Pennsylvania Supreme Court." Pet. App. 10d (quotation omitted).

On remand, the magistrate judge found that Nara's lawyer had misled him and thereby prevented him from complying with the statute of limitations, which resulted in equitable tolling of

the limitations period. The Commonwealth did not object, and the district court then adopted the Report and Recommendation. Pet. App. 10d.

The magistrate judge subsequently issued a lengthy Report and Recommendation, see Pet. App. 1f-64f, in which he concluded, as relevant here, that Nara had "fairly presented" his incompetency claim to each level of the Pennsylvania judiciary, *id.* at 29f, and that Nara's federal due process rights were violated because he was mentally incompetent when he pleaded guilty, *id.* at 63f.

With respect to presentation of the incompetency claim to the state courts, the magistrate judge first analyzed the state and federal constitutional standards, and determined that they were "virtually indistinguishable" and analytically "indistinct." Pet. App. 29f-30f (quoting *Bisaccia v. Attorney General of New Jersey*, 623 F.2d 307, 312 (3d Cir.), cert. denied, 449 U.S. 1042 (1980)); see also Pet. App. 23f-29f. Because of Nara's persistence in presenting his constitutional claim based on incompetency to the state courts and because "[t]he authority cited in Nara's brief clearly shows that he raised a constitutional claim with respect to his guilty pleas; *i.e.*, that he was incompetent at the time he entered his guilty pleas," the magistrate judge found "no basis for the [Commonwealth]'s assertion that Nara did not fairly present his incompetency argument as a federal claim." *Id.* at 29f. Indeed, the magistrate judge found the argument to be "patently without merit," because Nara "presented his claim in specific terms that directly pointed to a right protected by the

Constitution." *Ibid.* The magistrate judge further found, in the alternative, that procedural default would not apply because the ineffectiveness of Nara's counsel and his mental incompetence would have constituted "extraordinary circumstances" excusing any such default as a matter of state law. *Id.* at 46f-51f; see *id.* at 50f (the government "has not carried its burden of demonstrating that the Pennsylvania courts consistently and regularly applied the statutory waiver rule to preclude claims of incompetency"). Finally, deferring to the state court's factual finding that Nara was incompetent at the time of his pleas, *id.* at 61f-63f, the magistrate judge concluded that the pleas were entered in violation of the federal Constitution, *id.* at 63f.

b. Under the Federal Magistrate Judge's Act, 28 U.S.C. § 636, both parties had ten days to object to the Report and Recommendation, which specifically warned that "[f]ailure to file timely objections may constitute a waiver of any appellate rights." Pet. App. 11d. Neither petitioner nor Nara filed any objections. Twenty-six days after the magistrate judge issued the Report and Recommendation, the district court adopted the decision and granted Nara's petition for a writ of habeas corpus. *Id.* at 1e-4e.

Seventeen days later, petitioner filed a motion to vacate the district court's judgment pursuant to Federal Rule of Civil Procedure 60(b), claiming that it was unaware of the Report and Recommendation, notwithstanding the district court's standing order for attorneys to register with its Case Management/Electronic Case Files system.

Pet. App. 11d, 13d. Before the district court could rule on the motion, petitioner filed a notice of appeal. The district court subsequently dismissed the Rule 60(b) motion as moot. *Id.* at 11d-12d.

6. The court of appeals affirmed. The court first held that petitioner's appeal would be reviewed under a plain error standard of review, because petitioner had failed to pursue any argument or objection to the district court either based on the magistrate judge's Report and Recommendation or in its abandoned Rule 60(b) filing. Pet. App. 12d-20d. The court of appeals explained that petitioner's "overall negligence in handling the matter preclude[d] [it] from finding" that petitioner's failure to file timely objections was excusable. *Id.* at 13d. Beyond failing to object to the magistrate judge's report and recommendation, petitioner "ha[d] offered no excuse for" its failure to respond to the *district court's* order for an additional seventeen days, "[d]espite the urgency of the situation." *Id.* at 14d. Accordingly, the court of appeals held that petitioner's claims would be reviewed "for plain error." *Id.* at 14d, 18d. Under that standard, the district court's decision would be overturned only if petitioner demonstrated a "clear or obvious" error that "'seriously affected the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 20d (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)).

Applying that standard, the court of appeals held that the district court had not committed plain error in concluding that Nara had fairly presented his federal constitutional claim based on

incompetency to the state courts. Pet. App. 33d. Noting that the federal and state constitutional standards for reviewing claims of incompetency are identical, *id.* at 22d-23d, the court concluded that Nara had given the Commonwealth's courts "a full opportunity to address his federal incompetency claim by repeatedly stating his claim in terms so particular as to call to mind a specific right protected by the Constitution." *Id.* at 23d (quotation omitted). In particular, Nara's attorney had amended his second petition "to specifically include the argument that Nara was not competent to make a knowledgeable and willing plea at the time he entered it," and in his brief on appeal Nara had "articulated the test applied by both federal and state courts." *Ibid.* (quotation omitted). When he sought review by the Pennsylvania Supreme Court, "Nara specifically raised the invalidity of his plea, and * * * stated that he was mentally ill and incompetent to knowingly answer the plea court's questions." *Id.* at 24d (quotation omitted). Given the content of Nara's state court filings, the court of appeals concluded that it "[found] no plain error in the District Court's conclusion that Nara 'fairly presented' his incompetency claim to each level of the Pennsylvania judiciary." *Id.* at 33d.

The court of appeals further explained that its decision was consistent with *Baldwin v. Reese*, 541 U.S. 27 (2004), because the court required Nara's claims "to alert [the court] to the presence of a federal claim," Pet. App. 22d n.17, by stating it "in terms so particular as to call to mind a specific right protected by the Constitution," *id.* at 23d. The court concluded that the outline of that federal claim was

within Nara's pleadings themselves, and did not require courts "to search beyond the pleadings and briefs for a federal issue." *Id.* at 24d.

In addition, the court of appeals held that, even if it had found a plain and obvious error in the district court's decision, petitioner "ha[d] failed to show that any such error ha[d] seriously affected the fairness, integrity or public reputation of judicial proceedings." Pet. App. 33d n.20 (quotation omitted). In particular, the court of appeals ruled that, even if the incompetency claim had not been fairly presented, no procedural default would have resulted because "Pennsylvania courts * * * have consistently held rules of waiver inapplicable to incompetency claims." *Id.* at 25d. In addition, "Pennsylvania courts did not consistently bar successive post-conviction petitions – like Nara's – which allege prior counsel was ineffective." *Ibid.*

Finally, the court of appeals found no plain error in the conclusion that Nara's pleas had been obtained in violation of the Constitution due to his incompetency. Pet. App. 27d-33d. In particular, the court found no plain error in the district court's decision to accord a presumption of correctness to the state court's factual determination that Nara was incompetent at the time of the pleas, *id.* at 27d, because that factual determination "was left undisturbed by the Pennsylvania Superior Court," *id.* at 30d. The court of appeals further explained that "state trial judges deserve substantial deference" on such factual questions, and that "Judge Franks, a learned colleague of a coordinate court, was in a unique position from which he could

carefully assess witness credibility and demeanor in open court against his extensive experience with the case." *Id.* at 28d-29d. Because petitioner failed to come forward with any evidence to rebut the evidence of incompetency on which Judge Franks relied, the court of appeals concluded that there was "no plain error in the District Court's conclusion that Nara was incompetent when he pleaded guilty," and that, even if there had been error, it would not have "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Id.* at 33d & n.20 (quotation omitted).

ARGUMENT

For all of petitioner's (misplaced) concern with Nara's alleged procedural default, petitioner is noticeably silent about its own. The petition nowhere mentions that the Commonwealth failed to object to the magistrate judge's Report and Recommendation, failed to file a timely motion to reconsider under Federal Rule of Civil Procedure 59, and abandoned its Rule 60(b) motion before the district court could rule. Petitioner also fails to mention that the court of appeals' decision was framed entirely in terms of plain error review. See Pet. 8-10. The consequence of that procedural history is that the question presented in the petition is not, in fact, a question presented by this case.

1. Petitioner seeks (Pet. 11-16) this Court's review of the court of appeals' purported holding that Nara had fairly presented his federal claim even though he (allegedly) "d[id] not label the claim as federal or cite to a federal source of law" (Pet. 11). The problem for petitioner is that the court of appeals

made no such holding. The court of appeals held only that it found "no *plain error* in the [d]istrict [c]ourt's conclusion that Nara 'fairly presented' his incompetency claim." Pet. App. 33d-34d (emphasis added).

That record-bound holding does not merit this Court's review. The court of appeals' ruling is not contrary to *Baldwin v. Reese*, 541 U.S. 27 (2004). That was not a plain error case. Moreover, the *Baldwin* decision did not address whether the presentation of a state constitutional claim that is *identical* to a federal constitutional claim – like the Pennsylvania and federal standards for incompetency claims, Pet. App. 22d-23d – amounts to fair presentation of a federal claim for exhaustion purposes. See *Baldwin*, 541 U.S. at 33-34; see also *Howell v. Mississippi*, 543 U.S. 440, 444 (2005) (per curiam) (addressing the fair presentation of non-identical state and federal claims). The district court's resolution of that unanswered question in a manner that, by petitioner's own admission (Pet. 13-14) is consistent with the decisions of at least three courts of appeals, is not plain error.

Nor does the petition contain any argument that the district court's decision to give effect to a state court factual finding of incompetency "seriously affected the fairness, integrity or public reputation of judicial proceedings." Pet. App. 20d (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)). That argument is therefore waived. See *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 151 n.3 (1976). As a result, petitioner could obtain no benefit from and could not prevail on this Court's review.

Furthermore, there is no conflict in the circuits on the question of whether it was plain error for the district court to conclude that Nara's repeated assertion of an incompetency claim was fairly presented, where the state and federal constitutional standards are identical. Nor does that unusual issue arise with any frequency.

2. a. Even putting aside the narrowness of the court of appeals' plain-error ruling, petitioner's arguments for this Court's review fail. Contrary to petitioner's contention (Pet. 12-14), there is no conflict in the circuits. All of the courts of appeals to consider the question have held that a state prisoner fairly presents his federal claim when he raises a state claim for which the federal standard is identical. See *Scarpa v. Dubois*, 38 F.3d 1, 7 (1st Cir. 1994) ("[A] state-law claim that is functionally identical to a federal-law claim suffices to effectuate fair presentment of the latter claim."), cert. denied, 513 U.S. 1129 (1995); *Jackson v. Edwards*, 404 F.3d 612, 618 (2d Cir. 2005) (claim fairly presented where the state law claim "was not merely 'somewhat similar,'" to the federal claim, but was "virtually identical") (quoting *Duncan v. Henry*, 513 U.S. 365, 366 (1995)); *Bisaccia v. Attorney General of New Jersey*, 623 F.2d 307, 312 (3d Cir.) (where the state-law claim is "virtually indistinguishable from the [federal] due process allegation[,] * * * exhaustion of state remedies has been met"), cert. denied, 449 U.S. 1042 (1980); see also *Verdin v. O'Leary*, 972 F.2d 1467, 1476 (7th Cir. 1992) (suggesting that petitioner properly exhausts his federal claims when the "facts *and* legal theory are the same" and he demonstrates a "clonal relationship" between the two).

Petitioner's argument (Pet. 13) that the Eighth Circuit has held otherwise is wrong. Petitioner relies on *Carney v. Fabian*, 487 F.3d 1094 (8th Cir.), cert. denied, 128 S. Ct. 721 (2007), but that case did not involve identical state and federal constitutional standards. See *id.* at 1097 (finding no exhaustion when the federal constitutional standard "is not necessarily synonymous with the standard imposed under Minnesota state law"). When, as here, the federal and state standards are not merely similar, but identical, Eighth Circuit precedent suggests that raising the state claim will fairly present the federal claim as well. See *McDonald v. Bowersox*, 101 F.3d 588, 598 (8th Cir. 1996) ("A petitioner who presents a state law claim in state court will avoid procedural default with respect to a federal claim if 'the claim the petitioner made in state court is synonymous with an accepted principle of federal law.'") (quoting *Myre v. Iowa*, 53 F.3d 199, 201 (8th Cir. 1995)), cert. denied, 521 U.S. 1127 (1997).[1]

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[1] Petitioner's suggestion (Pet. 14-15) that there is a general division in circuit law on what constitutes a "fairly presented" federal claim is without merit. Besides being irrelevant to the plain-error question resolved here, circuit law is in substantial agreement. In *Daye v. Attorney General of New York*, 696 F.2d 186 (en banc), cert. denied, 464 U.S. 1048 (1982), the Second Circuit identified a non-exhaustive list of criteria for determining whether a petitioner has fairly presented his federal habeas corpus claim, including "(a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and

Accordingly, even outside the context of plain error review, there is no conflict in the circuits on the fair presentation issue when the state and federal standards are identical. That makes sense, moreover. While state courts have no obligation to review lower courts' decisions in selecting cases for discretionary review, see *Baldwin*, *supra*, state courts are properly charged with knowledge of the requirements of both the state and federal Constitutions, cf. *Testa v. Katt*, 330 U.S. 386 (1947), and thus must be aware when their standards are identical, such that a ruling under the state constitution necessarily resolves the same question under the federal Constitution.

3. Certiorari is not warranted for two additional reasons.

First, petitioner's claim that Nara did not distinctly raise his incompetency claim as a federal constitutional question in the state courts is factually wrong. Nara's second petition for post-conviction relief specifically argued that his

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(d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation." *Id.* at 194. The courts of appeals have generally adopted or employed those same factors in whole or in part. See *Nadworny v. Fair*, 872 F.2d 1093, 1097 (1st Cir. 1989); *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999); *Coleman v. Dretke*, 395 F.3d 216, 220 (5th Cir. 2004), cert. denied, 546 U.S. 938 (2005); *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006); *Wilson v. Briley*, 243 F.3d 325, 327 (7th Cir. 2001); *Watson v. Dugger*, 945 F.2d 367, 371-372 (11th Cir. 1991). The Second and Seventh Circuits have reaffirmed that position since *Baldwin*. See *Jackson*, 404 F.3d at 618; *Anderson v. Benik*, 471 F.3d 811, 815 (7th Cir. 2006).

incompetency at the time of the plea violated the federal Constitution. DCT App. 436-437. Although petitioner complains that Nara did not raise the federal Constitution on appeal in that case, that argument overlooks that Nara had prevailed below on incompetency grounds, making his incompetency the central issue on appeal. Moreover, it was the Commonwealth's appeal, and thus it was the Commonwealth that chose the issues to be raised on appeal, electing to rely upon purely procedural arguments concerning Nara's incompetency claim. When the Superior Court reinstated his pleas on appeal, Nara promptly reasserted his federal constitutional claim to the Pennsylvania Supreme Court and to this Court. *Id.* at 586, 595, 825-826; see generally *Dye v. Hofbauer*, 546 U.S. 1, 3-4 (2005) (per curiam) (federal claim raised in briefs is fairly presented).

Nara's first petition likewise expressly invoked the federal Constitution. See DCT App. 198, 200, 207-210, 213. The Superior Court, on appeal, addressed counsel's alleged ineffectiveness for failure to address Nara's incompetency. Pet. App. 6d. The claims were sufficiently overlapping that the Superior Court later held that its initial decision had resolved the incompetency claim, DCT App. 580, although the court then denied having addressed whether Nara's incompetency undermined the truth-determining process, and deemed that argument to be waived, *ibid.* Nara referred expressly to the federal Constitution in his appeal to the Pennsylvania Supreme Court. *Id.* at 825-826. Nara's third petition also specifically

invoked the protections of the federal Constitution. See 3d PCRA Pet. 3A & Exhs. A & B.

Consequently, contrary to petitioner's argument, this case simply does not present the question of whether a federal claim that is presented solely by reference to an identical state-law claim is fairly presented. Instead, consideration of the question petitioner raises would involve the record-bound analysis of whether a federal constitutional claim is fairly presented when it (i) is identical to a state law claim, (ii) is repeatedly raised in explicitly federal constitutional terms, see *Dye*, *supra*, (iii) is not affirmatively raised only on the *Commonwealth's* procedural appeal, and (iv) is confusingly described by the state appellate court as having been both previously resolved and previously waived, DCT App. 580. Even were petitioner not hobbled by the plain-error standard of review, the requested resolution of such a case-specific claim amounts (at best) to nothing more than an effort to obtain record-bound error correction.

Second, the court of appeals separately held that, even if the incompetency claim had not been fairly presented, there was no adequate state procedural bar because Pennsylvania courts do not generally or consistently bar review of such incompetency claims. See Pet. App. 24d-27d. Petitioner has not sought this Court's review of that portion of the court of appeals' judgment. Accordingly, the claim is waived, and review by this Court would not change the outcome of this case. In addition, Nara would also be entitled to demonstrate on remand that he could avoid

procedural default by demonstrating that either his mental incompetency or the ineffectiveness of his prior counsel (or both together) satisfies the cause-and-prejudice exception to procedural default. See, *e.g.*, *Edwards v. Carpenter*, 529 U.S. 446, 451-453 (2000).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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